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ATTORNEY GENERAL OF TEXAS

April 20, 2016

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2016-08924

Dear Mr. Ramirez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 606501.

The Lower Colorado River Authority (the "authority") received a request for forty-three categories of information related to WG Consulting and various services to be performed for the authority. The authority claims the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.104, 552.107, 552.111, 552.117, 552.133, and 552.139 of the Government Code and privileged under rule 192.5 of the Texas Rules of Civil Procedure and rule 503 of the Texas Rules of Evidence. We have considered the submitted arguments and reviewed the submitted representative samples of information.¹ Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). We find some of the submitted information is subject to sections 552.022(a)(1) and 552.022(a)(3). The authority must release the information subject to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. The authority must release the information subject to section 552.022(a)(3) unless it is made confidential under the Act or other law. Although the authority seeks to withhold the information at issue under sections 552.103 and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, orig. proceeding) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.111 do not make information confidential for purposes of section 552.022. Therefore, the information subject to section 552.022 may not be withheld under section 552.103 or 552.111. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). The authority also claims sections 552.101, 552.104, 552.133, and 552.139 of the Government Code for the information subject to section 552.022. Section 552.101 protects information made confidential under other law and sections 552.101, 552.133, and 552.139 make information confidential for purposes of section 552.022. Additionally, information encompassed by section 552.022 may be withheld under section 552.104. *See* Gov't Code § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)). Therefore, we will consider whether the information subject to section 552.022 is protected by rule 192.5 or sections 552.101, 552.104, 552.133, or 552.139. We will also address the authority's arguments against disclosure of the information not subject to section 552.022.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The authority states it has specific marketplace interests in the information in Exhibit B because the authority is competing in the wholesale power electric utility market. In addition, the authority states the information at issue, which consists of fuel hedging and commodities risks applications and their respective components, can be used to underbid authority fuel and commodities purchases for its power generation and to determine the specific terms the authority and its customers have agreed to and the pricing formulas that the authority uses to calculate charges to its wholesale electric customers. After review of the information at issue and consideration of the arguments, we find the authority has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the authority may withhold Exhibit B under section 552.104(a) of the Government Code.²

We next address the authority’s assertion of section 552.103 of the Government Code for the remaining information. Section 552.103 provides, in relevant part, as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 551 at 4 (1990). The

²As our ruling is dispositive, we need not address the authority’s remaining arguments against disclosure of this information.

governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this instance, the authority informs us that, prior to the authority’s receipt of the request for information, the requestor sent the authority a demand letter and notice of preservation. We note in this letter, which the authority has submitted to this office for review, the requestor demands full payment for services, and states “if [the authority] refuses, [the requestor’s client] will exercise its rights to collect this money and also seek recovery of attorneys’ fees, interest and other costs to pursue collection.” The authority explains the remaining information is related to the services at issue, and is therefore related to the anticipated litigation. Based on these representations and our review, we conclude the authority has shown that litigation was reasonably anticipated at the time the authority received the present request. Further, upon review, we find the remaining information is related to the anticipated litigation for purposes of section 552.103. Therefore, the authority may withhold the remaining information under section 552.103 of the Government Code.³

However, we note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Therefore, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, a section 552.103(a) interest no longer exists as to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

³As our ruling is dispositive, we need not address the authority’s remaining arguments against disclosure of the information at issue.

In summary, the authority may withhold Exhibit B under section 552.104(a) of the Government Code. The authority may withhold the remaining information under section 552.103 of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Rahat Huq
Assistant Attorney General
Open Records Division

RSH/akg

Ref: ID# 606501

Enc. Submitted documents

c: Requestor
(w/o enclosures)